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NO.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ANTHONY T. MANIACE, et al.,
Petitioners

v.

COMMERCE BANK OF KANSAS CITY, N. A.
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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62 pp

I. QUESTIONS PRESENTED FOR REVIEW.

1. Did the Eighth Circuit err in affirming the grant of summary judgment against the Petitioners on the basis that as a matter of law, the Respondent, as a directed trustee under an ERISA-governed retirement plan, was not a fiduciary with respect to the plan assets which were subject to a named fiduciary's investment direction?

2. Does ERISA permit a trustee's duties under an ERISA-governed retirement plan to be completely allocated to a named fiduciary under the governing trust document so as to absolve the trustee of all responsibility with respect to the investment of plan assets?

II. LIST OF PARTIES.

Petitioners are the former participants in and beneficiaries of the Juvenile Shoe Corporation of America Employee Stock Ownership Plan who had earned vested retirement benefits under the Plan. The named Petitioner, Anthony T. Maniace, was a member of this group of participants, and he is an individual residing in the State of Missouri. There are approximately 210 members of the participant group.

Respondent Commerce Bank of Kansas City, N.A. is a national banking corporation with its principal place of business in Kansas City, Missouri.

III. TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW . . . i

II. LIST OF PARTIES. ii

III. TABLE OF CONTENTS iii

IV. TABLE OF AUTHORITIES. vi

V. LOWER COURT OPINIONS. 1

VI. JURISDICTIONAL STATEMENT. 2

VII. RELEVANT STATUTORY PROVISIONS. 3

VIII. STATEMENT OF THE CASE. 3

1. Background Facts. 3

2. Lower Court Proceedings. 4

IX. REASONS FOR GRANTING THE WRIT 6

1. The Eighth Circuit's decision in this case, that a directed trustee under an ERISA-governed retirement plan is not a fiduciary, violates the express mandates of ERISA. 6

A. ERISA imposes specific duties on all plan fiduciaries. 6

B. ERISA describes the circumstances under which fiduciary responsibilities can be allocated. 6

C. ERISA prohibits trustee fiduciary duties from being completely allocated to a named fiduciary. 8

2. The *Maniace* decision is contrary to prior Eighth Circuit precedent on the issue of directed trustees and fiduciary status. 9

A. Eighth Circuit precedent has established that directed trustees are ERISA fiduciaries. 9

B. Eighth Circuit precedent has recognized two approaches for establishing fiduciary status. 12

3. The *Maniace* decision is inconsistent with rulings of the United States Supreme Court concerning interpretative principles and the application of trust law under ERISA. . . 14

4. The *Maniace* decision is contrary to well-established principles of trust law which apply to fiduciary issues under ERISA-governed plans. 14

5. The *Maniace* decision thwarts important public policies regarding the purpose of ERISA, which is to protect the rights and interests of participants in their retirement benefits. 16

6. Following this Court's decision in *Mertens v. Hewitt Associates*, __ U.S. __ , 113 S.Ct. 2063 (1994), the decision in *Maniace* will completely immunize directed trustees from civil actions by plan participants in spite of

improper or incompetent performance of their duties. 17

X. CONCLUSION. 18

APPENDIX

APPENDIX A A-1
DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT

APPENDIX B A-17
DISTRICT COURT ORDER DENYING MOTION TO ALTER OR AMEND

APPENDIX C A-19
EIGHTH CIRCUIT OPINION AFFIRMING SUMMARY JUDGMENT

APPENDIX D A-29
EIGHTH CIRCUIT OPINION DENYING MOTION FOR REHEARING

APPENDIX E A-30
STATUTES

1. 29 U.S.C. §1002(21)(A), ERISA §3(21)(A) A-30
2. 29 U.S.C. §1103(a), ERISA 403(a) A-30
3. 29 U.S.C. §1104(a), ERISA §404(a) A-31
4. 29 U.S.C. §1105; ERISA §405 . . . . . A-32
5. 29 U.S.C. §1110(a), ERISA §410(a) A-35

IV. TABLE OF AUTHORITIES.

Cases

American Federation of Unions Local 102 v. Equitable Life Assurance Society, 841 F.2d 658 (5th Cir. 1988) 12

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 105 S.Ct. 2833 (1985) 8, 14, 16

Coleman v. Nationwide Life Insurance Company, 969 F.2d 54 (4th Cir. 1992) 12

Ershick v. United Missouri Bank, 948 F.2d 660 (10th Cir. 1991) 12

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989) 14

FirsTier Bank, N.A. v. Zeller, 16 F.3d 907 (8th Cir. 1994) 10, 11

Kerns v. Benefit Trust Life Insurance Company, 992 F.2d 214 (8th Cir. 1993) 12, 13

Mertens v. Hewitt Associates, 113 S.Ct. 2063, ___ U.S. ___ (1993) 13, 14, 17

Statutes

28 U.S.C. §1254(1) 2

29 U.S.C. §1001(b), ERISA §2(b) 17

29 U.S.C. §1001(a), ERISA §2(a) 16

29 U.S.C. §1002(21)(A), ERISA §3(21)(A) 3, 12, 13

29 U.S.C. §1002(38), ERISA §3(38) 7

29 U.S.C. §1102(a), ERISA §402(a) 13

29 U.S.C. §1103, ERISA §403 ..... 3, 6, 8, 10, 17

29 U.S.C. §1104(a), ERISA §404(a) 3, 6, 11

29 U.S.C. §1105, ERISA §405 ..... 3, 7, 9, 11

29 U.S.C. §1106, ERISA §406 11

29 U.S.C. §1109(a), ERISA §409(a) 6

29 U.S.C. §1110, ERISA §410 ..... 3, 9

29 U.S.C. §1132(e), ERISA §502(e) 4

Miscellaneous

Bogert and Bogert, *The Law of Trusts & Trustees* §122 (Rev. Sec. Ed. 1984) 14

Report of Committee on Fiduciary Responsibility (Employee Benefits Group), "Directed Trusts Under ERISA," 12 *Real Prop., Prob. and Tr. J.* 535 (1977) 14

Restatement (Second) of Trusts, §185 (1959) 14

Scott and Fratcher, IIA *Scott on Trusts* §185 (4th ed. 1987) 11, 14, 16

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V. LOWER COURT OPINIONS.

1. The Honorable Joseph E. Stevens, Jr., United States District Judge in the Western District of Missouri, entered his opinion granting summary judgment in favor of the Respondent on April 14, 1993. The decision in case number 90-5021-CV-SW-8 was not published; however, Petitioners have reprinted this opinion in Appendix A, at page 1 of this Petition.

2. Judge Stevens denied the Petitioners' Motion to Alter or Amend the Judgment on December 10, 1993. This decision was also not published; however, Petitioners have reprinted this opinion in Appendix B, at page A-17 of this Petition.

3. Writing for a three-judge panel of the Eighth Circuit Court of Appeals, the Honorable Andrew W. Bogue, Senior District Judge, sitting by designation, issued an opinion affirming the grant of summary judgment on November 8, 1994. The decision is published at 40 F.3d 264 (8th Cir. 1994); however, Petitioners have reprinted the opinion in Appendix C, at page A-19 of this Petition.

4. The Eighth Circuit denied the Petitioners' Petition for Rehearing with Suggestions for Rehearing En Banc on December 18, 1994. The decision was not published; however, Petitioners have reprinted the opinion in Appendix D, at page A-29 of this Petition.

VI. JURISDICTIONAL STATEMENT.

(i) The judgment which Petitioners are requesting be reviewed by this Court was entered by the Eighth Circuit on November 8, 1994.

(ii) The Petitioners' timely Request for Rehearing was denied on December 19, 1994. No extensions of time have been requested for the filing of this Petition.

(iii) This is not a cross-petition which relies upon Rule 12.3.

(iv) This Court has jurisdiction to review the opinion of the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1254(1).

VII. RELEVANT STATUTORY PROVISIONS.

29 U.S.C. §1002(21)(A), ERISA §3(21)(A)

29 U.S.C. §1103(a), ERISA §403(a)

29 U.S.C. §1104(a), ERISA §404(a)

29 U.S.C. §1105, ERISA §405

29 U.S.C. §1110, ERISA §410

The text of these statutes is reprinted in Appendix E, beginning at page A-30 of this Petition.

VIII. STATEMENT OF THE CASE.

1. Background Facts.

Petitioners are the former participants in and beneficiaries of the Juvenile Shoe Corporation of America Employee Stock Ownership Plan ("Plan") who had earned vested retirement benefits under the Plan. As an employee stock ownership plan, the Plan assets were invested primarily in stock of the Juvenile Shoe Corporation of America ("Juvenile Shoe").

The Respondent, Commerce Bank of Kansas City, N.A. ("Commerce Bank") became the Trustee of the Plan in 1979 when Juvenile Shoe converted its profit-sharing plan into an employee stock ownership plan. Under the Trust document, Commerce Bank was granted general trustee powers and authority, permitting it to, among other things, invest trust fund assets in a variety of mediums, to vote stocks held by it, and "in general to protect in any way the interest of the Trust Fund."

However, paragraph 5 of the Trust provided that ". . .[t]he Trustee's duties and responsibilities with respect to the purchase, sale, retention, distribution or other action with

respect to Company Stock . . . shall be limited to effecting the direction of the Committee, discretionary fiduciary responsibilities with respect to such matters being hereby allocated to the Committee."

The Committee consisted of two and sometimes three executive-level employees of Juvenile Shoe.

Due to a number of facts and circumstances, Juvenile Shoe began experiencing serious financial problems in 1987. In the summer of 1988, after three executives of Commerce Bank met with Juvenile Shoe representatives and became aware of the severity of the company's problems, Commerce Bank resigned as Trustee. No successor trustee was ever appointed. The Company failed in 1989, and the Juvenile Shoe stock and the entire balance of the Plaintiffs' retirement benefits thereby became worthless.

2. Lower Court Proceedings.

Petitioners commenced this action on July 3, 1990 against the Administrative Committee and the Trustee of the Plan alleging that they breached their ERISA fiduciary duties. The action was filed in the United States District Court for the Western District of Missouri based upon federal question jurisdiction under Section 502(e) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(e).

As the case proceeded, the Plaintiffs dismissed, without prejudice, their cause of action against the members of the Administrative Committee due in large part to the death in October, 1990 of Charles Allison, the primary Committee member and the remaining Committee members' lack of resources to satisfy any judgment against them.

Petitioners' Complaint against Commerce Bank basically alleged that as Trustee of the Plan, it failed to fulfill its fiduciary obligations to prudently manage and protect their

interests in the Plan assets which it held in the Trust. In addition, Petitioners alleged that the Respondent's conduct (or lack of conduct) enabled the Administrative Committee to ignore and breach its fiduciary duties with respect to the management of the Juvenile Shoe stock investment, and that Commerce Bank failed to take any reasonable action to remedy the situation or protect the participants.

Respondent Commerce Bank filed a Motion for Summary Judgment on February 26, 1992. Judge Stevens granted the Motion on April 14, 1993, finding that the Respondent was not a fiduciary with respect to the Juvenile Shoe stock investment and that there could therefore be no breach of duty. Petitioners' Motion to Alter or Amend the Judgment was subsequently denied on December 10, 1993.

A timely Notice of Appeal was filed by the Petitioners and after submission of written briefs and oral argument, a three-judge panel of the Eighth Circuit Court of Appeals issued an opinion affirming the grant of summary judgment on November 8, 1994. Petitioners' Petition for Rehearing was denied on December 19, 1994.

The basic issue throughout this case has been the meaning and legal effect of paragraph 5 of the ESOP Trust. Writing for the panel, Judge Bogue held that as a result of the allocation of investment duties to the Administrative Committee, Commerce Bank, as Trustee of an ERISA-governed retirement plan, was not a fiduciary with respect to the Plan's investment in Juvenile Shoe stock.

Because this decision is contrary to the express mandates of ERISA, Eighth Circuit precedent, United States Supreme Court rulings in this area, well-established trust law and vital public policies, Petitioners are hereby respectfully requesting that this Court accept this case for review.

IX. REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's decision in this case, that a directed trustee under an ERISA-governed retirement plan is not a fiduciary, violates the express mandates of ERISA.

A. ERISA imposes specific duties on all plan fiduciaries.

ERISA §404(a)(1) imposes three basic duties on employee benefit plan fiduciaries. Such individuals are required to perform their duties: a) in the sole interest of the participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses, (the duty of loyalty), b) prudently, and c) in accordance with the plan/trust documents to the extent that their provisions are consistent with ERISA. 29 U.S.C. §1104(a). A fiduciary that fails to fulfill its duties may be held personally liable to the plan for any resulting losses. ERISA §409(a), 29 U.S.C. §1109(a).

B. ERISA describes the circumstances under which fiduciary responsibilities can be allocated.

With certain exceptions which are not pertinent to this case, ERISA requires that all employee benefit plan assets be held in trust by one or more trustees. ERISA §403(a), 29 U.S.C. §1103(a). A trustee is by definition a fiduciary that generally has exclusive authority for managing or controlling the assets of a benefit plan. *Id.*

It is permissible, however, for all or a portion of a trustee's duties to be allocated or delegated to an investment manager, another trustee or to a named fiduciary. ERISA specifically describes the consequences to the trustee of such allocations, which vary, depending upon the status of the delegatee. However, in none of these situations, is the trustee transformed into a non-fiduciary custodian.

- Investment manager. Under ERISA §405(d), if the authority to manage plan assets is delegated to an "investment manager,"[1] the trustee is absolved of any responsibility for the management of those assets.[2]

- Another trustee. Under ERISA §405(b)(1), if investment responsibility is allocated among two or more trustees, each trustee is excused from liability with respect to the assets under the other trustee's control, unless the trustee participates in or conceals a breach by the other trustee, enables the other trustee to commit a breach by his own inadequate conduct, or fails to take reasonable steps to remedy a known breach by the other trustee. 29 U.S.C. §1105(b)(1)(B). This Section further imposes an affirmative obligation on each trustee to "use reasonable care to prevent a co-trustee from committing a breach." 29 U.S.C. §1105(b)(1)(A).

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[1]ERISA §3(38) defines an "investment manager" as "any fiduciary (other than a trustee or named fiduciary . . .) -- (A) who has the power to manage, acquire, or dispose of any asset of a plan; (B) who is (i) registered as an investment advisor under the Investment Advisers Act of 1940; (ii) a bank, as defined in that Act; or (iii) is an insurance company qualified to perform services under subparagraph (A) under the laws of more than one State; and (C) has acknowledged in writing that he is a fiduciary with respect to the plan." 29 U.S.C. §1002(38).

[2]ERISA §405(d) provides that "[i]f an investment manager or managers have been appointed under section 402(c)(3), . . . no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager." 29 U.S.C. §1105(d)(1).

- A named fiduciary. Under ERISA §403(a)(1), if the management and control of the trust assets is delegated to a named fiduciary who is not a trustee or investment manager, the trustee is only excused from liability if it follows directions which are proper, consistent with the terms of the plan and trust and not contrary to the requirements of ERISA.

It is this third situation which is presented by the facts of this case. The Administrative Committee of the Plan was clearly not a trustee or an investment manager. Accordingly, Commerce Bank could only have satisfied its responsibilities under ERISA if it followed proper directions of the Committee which did not violate the terms of the plan or the requirements of ERISA, including the fiduciary requirements of prudence and loyalty.[3]

C. ERISA prohibits trustee fiduciary duties from being completely allocated to a named fiduciary.

In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568, 105 S.Ct. 2833, 2839 (1985), this Court recognized that "trust documents cannot excuse trustees from their duties under ERISA and that trust documents must generally be construed in light of ERISA's policies." *Id.*

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[3]The Senate Committee Report on §404 (which outlines the fiduciary duties) indicates that the original language required that fiduciaries act "in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of this section." However, in the final version, the language was broadened to require that the document be followed only if it complies with all provisions of ERISA. Sen. Rep. 93-127, 93d Congr., 1st Sess. (1974) U.S.Code Cong. & Admin. News 4866.

ERISA's policy with regard to the allocation of trustee duties is clearly described in §410(a), which provides that:

> Except as provided in section 405(b)(1) [allocations to trustees] and 405(d) [allocations to investment managers], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part (part 4-Fiduciary Responsibility) shall be void as against public policy. 29 U.S.C. §1110(a).

In other words, only agreements allocating duties to investment managers and other trustees can effectively relieve a trustee of its fiduciary responsibilities. ERISA does not permit any other fiduciaries to be relieved of the statutory fiduciary duties imposed upon them by ERISA. Congress declared that any such attempt or provision is to be declared void as against public policy.

The trust document in the *Maniace* case allocated investment authority with respect to the Juvenile Shoe stock investment to a named fiduciary, the Administrative Committee. The Eighth Circuit's opinion in this case, holding that the trust language operated to relieve Commerce Bank of its fiduciary duties as Trustee, is contrary to the ERISA statutes and to public policy, as clearly declared by Congress.

2. The *Maniace* decision is contrary to prior Eighth Circuit precedent on the issue of directed trustees and fiduciary status.

A. Eighth Circuit precedent has established that directed trustees are ERISA fiduciaries.

Interestingly, the Eighth Circuit recently addressed the issue of what fiduciary responsibilities are retained by a

directed trustee, and it held that such persons clearly continue to be subject to the duties of prudence and loyalty.

In *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907 (8th Cir. 1994), the trustee was generally responsible for the management of all of the plan assets. However, the plan document provided that "[t]he Trustee may, and shall at the direction of the Company, make a loan or loans to a Participant." Upon receiving appropriate directions from the president of the Company, the bank trustee made loans from the plan assets to a number of participants which were secured by their interests in the plan. The participants subsequently re-loaned the money to the Company, which later defaulted on the loans.

After the default, the bank trustee filed a declaratory judgment action in order to clarify its status with respect to the Plan. The participants filed third-party claims and counterclaims, asserting, among other things, that the bank trustee should not have complied with the Company's instructions to lend them money from their plan accounts.

Based upon the plan language allocating authority and responsibility for loan investments to the Company, the bank trustee had argued that it had no fiduciary duties with respect to the loans. However, the Eighth Circuit did not accept that argument in the *FirsTier* case.

Judge Loken pointed out that ERISA §403(a) permits a trustee's control of ERISA plan assets to be made "subject to proper directions" of another fiduciary if those directions "are made in accordance with the terms of the plan and ... are not contrary to this chapter." 29 U.S.C. §1103(a). He concluded that the language requiring that the directions be "not contrary to this chapter" modifies, but does not eliminate the Trustee's fiduciary duty when handling plan assets. "When the direction comes from another fiduciary, as it did in this case, the law of trusts does not excuse a compliant trustee from all fiduciary responsibility." *Id.* at 911. In support of

this ruling, the *FirsTier* Court relied upon analogous trust law, as explained in IIA *Scott on Trusts* §185, at p.574 (4th ed. 1987),

> [W]here the holder of the power [to direct the Trustee] holds it as a fiduciary, the trustee is not justified in complying with his directions if the trustee knows or ought to know that the holder of the power is violating his duty to the beneficiaries as fiduciary in giving directions. *Id.*

The *FirsTier* Court reasoned that by adding the limitation in §1103(a) (ERISA §403) requiring that a named fiduciary's directions to a trustee be "not contrary to this chapter," Congress adopted the above standard from *Scott on Trusts* in ERISA. The Court held:

> Thus, an ERISA Trustee who deals with plan assets in accordance with proper directions of another fiduciary is not relieved of its fiduciary duties to conform to the prudent man standard of care, *see* 29 U.S.C. §1104(a); to attempt to remedy known breaches of duty by other fiduciaries, *see* 29 U.S.C. §1105(a); and to avoid prohibited transactions, *see* 29 U.S.C. §1106. *Id.*

Judge Bogue's opinion in the *Maniace* case distinguished the *FirsTier* decision on a factual basis, pointing out that the trustee in that case had "general fiduciary responsibility for all plan assets" and was subject to directions from the named fiduciary only with respect to the making of plan loans. This is true, of course. However, the difference in the two cases is not substantive, but is instead only one of degree.

As with the present case, the issue in the *FirsTier* suit concerned only the trustee's handling of the plan assets which

were subject to the Company's direction. The legal principles which guided the *FirsTier* Court in holding that a directed trustee is still a fiduciary with respect to the assets subject to the named fiduciary's direction, and that such a trustee is still subject to the fiduciary requirements of prudence and loyalty, apply equally to the present case.

In declining to follow the *FirsTier* case, Judge Bogue may have been persuaded by *Ershick v. United Missouri Bank*, 948 F.2d 660 (10th Cir. 1991) in which the Court also ruled that a directed trustee is not subject to ERISA's fiduciary requirements.

B. Eighth Circuit precedent has recognized two approaches for establishing fiduciary status.

The opinion in the *Maniace* case relied solely upon ERISA's "functional test" definition of "fiduciary." ERISA §3(21)(A) provides that "a person is a fiduciary ... to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of [plan] assets...." 29 U.S.C. §1002(21)(A).

Citing Kerns v. Benefit Trust Life Insurance Company, 992 F.2d 214 (8th Cir. 1993), *Coleman v. Nationwide Life Insurance Company*, 969 F.2d 54 (4th Cir. 1992) and *American Federation of Unions Local 102 v. Equitable Life Assurance Society*, 841 F.2d 658 (5th Cir. 1988), Judge Bogue reasoned that since the Plan allocated discretionary authority to the Administrative Committee with respect to the Juvenile Shoe stock investment in the Trust, Commerce Bank was not a fiduciary with regard to those assets. These cases, however, were not analogous to the facts presented in *Maniace*. All three cases involved participant/beneficiary suits against insurance companies and their agents or brokers, none of which had assumed a traditional plan fiduciary role such as trustee or administrator.

In *Kerns*, 992 F.2d at 216, the Eighth Circuit had explained that there are two approaches for establishing the fiduciary status of a party. First, such individual or entity may be designated or named as such in the plan document, as is required under ERISA §402(a)(1), 29 U.S.C. §1102(a)(1). The *Kerns* Court went on to point out that "(t)he statute also provides that any other person 'is a fiduciary to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan...'" *Id. citing* 29 U.S.C. §1002(21)(A)(emphasis added). Because there was neither a written plan nor a designated fiduciary, the plaintiff in *Kerns* was required to prove that the insurance company and/or its agent were "§1002(21)(A) fiduciaries," i.e., that they had discretionary authority or control.

Although the issue of fiduciary status was not before this Court in *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, ___ U.S. ___ (1993), Justice Scalia, writing for the majority, used the same analysis as described above. "The statute provides that not only the persons named as fiduciaries by a benefit plan, see 29 U.S.C. §1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see 29 U.S.C. §1002(21)(A), is an ERISA fiduciary." 113 S.Ct. at 2066 (emphasis added). Later, Justice Scalia explained that the functional test of fiduciary status "expand[s] the universe of persons subject to fiduciary duties - and to damages - under §409(a)." *Id.* at 2071 (emphasis added).

In the present case, Commerce Bank was a fiduciary because it accepted the position of Trustee of the Plan, which by definition is a fiduciary designation.

3. The *Maniace* decision is inconsistent with rulings of the United States Supreme Court concerning interpretative principles and the application of trust law under ERISA.

This Court has repeatedly explained that the ERISA fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries many of the principles which have been developed in the law of trusts and that ERISA is to be construed against the background of the common law of trusts. *See, e.g., Mertens v. Hewitt Associates*, ___ U.S. ___, 113 S.Ct. 2063, 2073 (1993); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-11, 109 S.Ct. 948 (1989); *see also Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-71, 105 S.Ct. 2833, 2939-40 (1985).

In the *Maniace* case, the Eighth Circuit declined to consider or apply the established trust law principles which provide that a directed trustee continues to owe strict fiduciary responsibilities to the beneficiaries of the trust.

4. The *Maniace* decision is contrary to well-established principles of trust law which apply to fiduciary issues under ERISA-governed plans.

The established commentators in the trust law area all agree that a trustee who is subject to direction from another fiduciary, for example, with respect to investments, is not excused from his fiduciary duties with respect to those investments. *See, e.g.*, Scott and Fratcher, *Scott on Trusts*, §185 (4th Ed. 1987); Bogert and Bogert, *The Law of Trusts & Trustees* §122 (Rev. Sec. Ed. 1984); *Restatement (Second) of Trusts*, §185 (1959).

There is also a thorough analysis and discussion of this issue in the Report of Committee on Fiduciary Responsibility (Employee Benefits Group), "Directed Trusts Under ERISA," 12 *Real Prop., Prob. and Tr. J.* 535, 546-51 (1977). In that

article, the authors reviewed general trust law and pre- and post-ERISA law and concluded that "a directed trustee is no less responsible than one who is not directed for the acts and omissions of every other plan fiduciary, including each member of the investment committee giving the directions." *Id.* at 546.

In addition to the excerpts quoted in the *FirsTier* case discussed at pages 10 through 12 of this Petition, Mr. Scott has further elaborated on the subject of directed trustees and their fiduciary duties.

> A trustee is not always justified in complying strictly with the terms of a trust. As has been stated, where the trustee is forbidden by the terms of the trust to sell certain property, but where, owing to circumstances not known to the settlor and not anticipated by him, compliance with the provision would defeat or substantially impair the accomplishment of the purposes of the trust, he can apply to a proper court for a direction or permission to deviate from the terms of the trust, and he may be liable for failure to apply to the court, if he knew or reasonably should have known of the existence of those circumstances.
>
> * * *
>
> The trustee is not necessarily justified in complying with the directions of the holder of the power merely because he does not actually know that the latter is violating his duty as fiduciary. He is liable if he should know of the violation of duty. He is ordinarily under a duty to make a reasonable inquiry and investigation in order to determine whether the holder of the power is violating his duty. Thus, if it is provided that the trustee shall make such

> investments as a third person shall direct, it is ordinarily the duty of the trustee to make some investigation into the propriety of the investment. If as a result he believes that the holder of the power is abusing the discretion conferred on him in directing the investment, he should inform him of this. If the holder of the power still insists on his making the investment, the trustee should apply to the court for instructions. Scott and Fratcher, *Scott on Trusts*, §185.

Under the common law of trusts, the Respondent clearly had a duty to make reasonable inquiries as to the continuing prudence of the Juvenile Shoe stock investment, and to take reasonable actions to protect the participants' interests in the Plan once it became apparent that the investment was imprudent.

5. The *Maniace* decision thwarts important public policies regarding the purpose of ERISA, which is to protect the rights and interests of participants in their retirement benefits.

In *Central States*, this Court pointed out that "after almost a decade of studying the Nation's private pension plans, ... Congress found that the continued well-being and security of millions of employees and their dependents are directly affected by these plans." 472 U.S. at 569, 105 S.Ct. at 2839, *citing* 29 U.S.C. §1001(a); ERISA §2(a).

The facts underlying the *Maniace* case exemplify the tragic results when participants who have invested years of service for a company are suddenly left with none of the retirements benefits for which they had worked and upon which they had relied for support in their later years.

ERISA was enacted for the specific purpose of protecting the interests of participants and their beneficiaries

in employee benefit plans by, among other things, "establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA §2(b), 29 U.S.C. §1001(b).

An important part of Congress' plan for protecting participants' interests is ERISA's requirement that all plan assets be held in trust by one or more trustees. ERISA §403, 29 U.S.C. §1103. Congress permitted trustee responsibilities to be allocated in the governing documents to others, but only under prescribed circumstances which would still provide protection to plan participants, i.e., to professional investment managers or to other trustees with co-fiduciary responsibilities.

In the case of an allocation of trustee duties to a named fiduciary, Congress clearly intended and provided that the trustee must continue to have fiduciary responsibility for the management of the plan assets.

6. Following this Court's decision in *Mertens v. Hewitt Associates*, __ U.S. __ , 113 S.Ct. 2063 (1994), the decision in *Maniace* will completely immunize directed trustees from civil actions by plan participants in spite of improper or incompetent performance of their duties.

This Court recently ruled in *Mertens v. Hewitt Associates*, __ U.S. ___ , 113 S.Ct. 2063 (1993) that nonfiduciaries are not subject to liability under ERISA. The application of this holding to cases such as *Maniace* will have far-reaching implications.

Although the majority in *Mertens* declined to decide the issue, Justices White, Stevens and O'Connor pointed out in their dissent that state court actions against non-fiduciaries in connection with their conduct or services with respect to employee benefit plans would almost certainly be pre-empted. ___ U.S. ___ , 113 S.Ct. at 2071, 2074. Following *Mertens*,

the *Maniace* opinion will result in directed trustees, such as Commerce Bank, being completely immune from participant suits in state or federal court, regardless of what they have done.

This interpretation leads to anomalous results in that many participants and beneficiaries now have less protection for their retirement benefits than they had at common law before ERISA was enacted. This loss of protection for participants and the accompanying insulation from liability for the many directed trustees of retirement plans throughout the country causes this opinion to present an issue of extreme public importance.

After the *Mertens* decision, Supreme Court guidance on the distinction between a fiduciary and a nonfiduciary has become crucial. Participants must be able to determine who is responsible for protecting their rights and to whom they can look for compensation in the event those rights are violated.

X. CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted by this Honorable Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

SOUTHWESTERN DIVISION

No. 90-5021-CV-SW-8

ANTHONY T. MANIACE, et al.

Plaintiffs,

v.

COMMERCE BANK OF KANSAS CITY

Defendant.

ORDER

This matter is before the court on defendant's motion for summary judgment.

FACTS

This dispute arises out of an employee stock ownership plan (ESOP) created in February 1979 for the management and sales employees of The Juvenile Shoe Corporation of America (JSC). The ESOP named Commerce Bank as Trustee and delegated some duties, which will be explained later, to an administrative committee of JSC's board of directors. The JSC ESOP invested primarily in the stock of the corporation. In the late 1970s, JSC encountered increasing competition which led to decreasing profits and net worth by the mid-1980s. Beginning in 1986, the company began to experience a series of management, labor and quality problems. In January 1988, Gale Pate Jr., the former president of the company was replaced as CEO by the Board of Directors of JSC. He then attempted to call a shareholders' meeting to remove the Board and regain his position. Pate was unable to organize a meeting and no vote was ever taken on the issue.

Soon after this management fight, Commerce Bank became troubled by JSC's financial condition and resigned as Trustee on July 12, 1988, its resignation to become effective sixty days later, in accordance with the Trust document. JSC filed for Chapter 7 bankruptcy in August 1989 and the JSC stock in the ESOP was rendered worthless. During JSC's difficulties, Commerce Bank neither sold the company stock nor participated in the ongoing management feud.

Plaintiffs brought this lawsuit to recover for the losses to the ESOP, and their first amended complaint alleges three counts against defendant Commerce Bank. Count I alleges that defendant had "discretionary authority to manage and control the assets" of the JSC ESOP and that defendant breached its fiduciary duties to the plan by:

> (1) failing to carry out its fiduciary responsibilities under the Trust;
>
> (2) failing to exercise its duties with the care, skill, prudence and diligence under the

circumstances then prevailing that a prudent company acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of similar character and with like aims;

(3) failing to discharge its duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan;

(4) failing to preserve the corpus of the Trust;

(5) failing to exercise its power as authorized under paragraph six (6) of the Trust to vote The Juvenile Shoe Corporation of America Stock which it held as Trustee with the care, skill, prudence, and diligence . . . that a prudent company . . . would use . . .;

(6) retaining The Juvenile Shoe Corporation of America Stock which it held as trustee . . .;

(7) failing to act . . . to preserve the assets of the Trust when requested to do so by the participants and beneficiaries of the Plan.

(8) failing to keep the participants informed of the status of the corpus.

In Count II, plaintiffs allege that defendant Commerce Bank failed to discharge its fiduciary duties when it knew that the administrative committee had breached its duties to the plan and failed to remedy the committee's breaches. Count II also alleges that Commerce Bank enabled the administrative committee to commit the alleged breaches through the bank's failures, as alleged in Count I. In Count III, individual plaintiff Anthony T. Maniace alleges that Commerce Bank failed to make a distribution to him as required by the plan. Defendant Commerce Bank now moves for summary judgment on all counts.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts must be viewed in the light most favorable to the nonmoving party, who must be given the benefit of all reasonable inferences which may be made from the facts disclosed in the record. Adickes v. S.H. Kress & Co., 398 U.S 144 (1970); Raschick v. Prudent Supply, Inc., 830 F.2d 1497, 1499 (8th Cir. 1987), cert. denied, 485 U.S. 935 (1988).

If a party is unable to make a sufficient showing as to some essential element of its case upon which it will bear the ultimate burden of proof at trial, all other facts are necessarily immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A party seeking summary judgment bears the initial burden of demonstrating to the court that an essential element of the nonmoving party's case is lacking, Id. The burden then shifts to the nonmoving party to come forward with sufficient evidence to demonstrate that there is a factual controversy as to that element, or to explain why such evidence is not currently available. Id.; Fed. R. Civ. P. 56(e). If the nonmoving party fails to so respond, summary judgment, if appropriate, shall be entered against such party. Fed. R. Civ. P. 56(e) The standard for determining whether a factual dispute is genuine is the same as the standard applied to motions for a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The nonmoving party must come forward with sufficient evidence to allow a reasonable jury to find in its favor. Id. at 251.

DISCUSSION

Count I

An ESOP, such as the one at Juvenile Shoe, is governed by the Employee Retirement Income Security Act,

29 U.S.C. §§ 1001 et seq. (ERISA). ERISA provides that the trustees of an ESOP owe a fiduciary duty to the plan and the beneficiaries:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and --
>
> > (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use.

29 U.S.C. § 1104(a)(1).

The essence of Count I is that defendant breached its fiduciary duties by failing to take action with regard to the JSC stock that was held in the ESOP. For the reasons set forth below, the court finds that defendant Commerce Bank had no fiduciary duties with respect to the JSC stock. Accordingly, the motion of Commerce Bank for summary judgment on Count I is granted.

The trust document is quite clear about Commerce's role as a trustee. The trust names Commerce Bank as trustee at the beginning of the document. The word "trustee" is defined as "the Trustee acting as Trustee under the terms of this Trust." The duties of the trustee are set forth in paragraphs 3 and 4:

> 3. The Trustee shall hold the Trust Funds and apply the principal thereof for the purposes of paying, in accordance with the Plan, benefits to Participants in the Plan and their beneficiaries entitled thereto, and the administrative expenses of the plan, as provided hereinafter. **It shall be the responsibility of the Trustee to hold, to invest and reinvest the Trust Fund from time to time in its possession or under its control as Trustee . . .** The Trustee shall not

be responsible for the administration of the Plan.

> 4. **The Trustee shall invest and reinvest principal and income of the Trust Fund and keep the same invested in any or all of the following type of investments:** savings accounts of and/or certificates of deposit issued by a bank (the Trustee being specifically authorized to invest and reinvest principal and income of the Trust Fund in savings accounts of and/or certificates of deposit issued by the commercial banking department of the Trustee), **Company Stock**, securities, bonds, debentures, stocks (common and preferred), real estate, mortgages, deeds of trust or other property . . . The Trust shall reserve from investment and keep unproductive of income such amount of the Trust Fund as the Committee may from time to time direct.

In spite of the broad authority granted the trustee in paragraphs 3 and 4, paragraph 5 of the Trust Document contains crucial imitations on the trustee's powers:

> 5. Anything herein contained to the contrary notwithstanding **the Trustee shall as directed by the Committee, from time to time, and upon such terms as directed by the Committee, purchase, sell, retain, distribute or otherwise act with respect to Company Stock** or any security of the Grantor arising therefrom, and borrow funds to acquire Company Stock or for any other Plan or Trust purpose and renew, extend, modify or otherwise act with respect to any loan made to the Trustee for any such purpose. **The Trustee's duties and**

> **responsibilities with respect to the purchase, sale, retention, distribution or other action with respect to Company Stock** or any security of Grantor arising therefrom and with respect to the borrowing of funds **shall be limited to effecting the direction of the Committee**, discretionary fiduciary responsibilities with respect to such matters having been allocated to the Committee.

Trust Document, attached as Exhibit A to plaintiffs' complaint (emphasis added). Thus, the trust document clearly gives the trustee full investment authority in paragraphs 3 and 4, subject to the limitations set forth in paragraph 5.

Admittedly, paragraph 5 is not a model of artful drafting. This Court has long been a proponent of "plain English" for lawyers. Paragraph 5 of this Trust Document is a prime example of the problems that archaic and formalistic language create. The phrase "anything herein contained to the contrary notwithstanding" is initially puzzling. However, after sending the phrase through a linguistic car wash, the Court is able to catch the drafter's drift. "Anything herein contained to the contrary" means "any provisions in the Trust Document that do not agree with the following." And the word "notwithstanding" means "without prevention or obstruction from or by." Webster's Third New International Dictionary 1545 (1981). Therefore, the phrase "anything herein contained to the contrary notwithstanding" in paragraph 5 should be interpreted to mean "Without obstruction by any provisions in the Trust Document that do not agree with the following." And, in plain English, paragraph 5 of the trust says: "[no matter what else the Trust Document says] . . . The Trustee's duties and responsibilities with respect to the purchase, sale, retention, distribution or other action with respect to Company Stock or any security of Grantor arising therefrom and with respect to the borrowing of funds shall be

limited to effecting the direction of the Committee . . . ." Plaintiffs' first amended complaint, at 4-5.

Contrary to the unreasonable interpretation urged by plaintiffs, the restriction of paragraph 5 applies to any other language or grant of authority in the document. Paragraph 6 of the Trust Document grants authority for a variety of specific actions, including the power to vote stock held by the trust by proxy and the power to sell stock. Plaintiffs would argue that these grants of authority are not covered by the restrictions in paragraph 5, but the unlimited scope of the language in that paragraph indicate to the contrary. The Court finds that all grants of authority in paragraph 6 are subject to the limitations on power outlined in paragraph 5.

Having examined plaintiffs' pleadings, the court finds that all the allegations contained in Count I related directly to the "purchase, sale, retention, distribution or other action with respect to Company Stock." Trust Document, ¶ 5. The Court further finds that the phrase "other action" in paragraph 5 encompasses the act of voting the proxies of the shares of JSC stock held by the ESOP. In addition, the court finds that the language of paragraph 5 is unequivocal in the wish that the administrative committee make all decisions regarding the ESOP's use of JSC stock.

Plaintiffs argue that Commerce Bank made representations before and after the trust was created that demonstrate that the bank had a duty to take action with respect to the stock. Plaintiff claims that promotional documents distributed by defendant prior to the creation of the trust created such a duty, and that a senior employee of the bank said that during the term of the trust, he felt there was "a gray area" as to responsibility to act.

The court rejects these arguments. The Trust Document and the provisions of ERISA are the only sources that establish responsibility for the trust assets. The Trust Document expressly takes away discretionary authority from

Commerce Bank. Therefore, the court must look to ERISA to find what fiduciary responsibility, if any, Commerce Bank had for company stock. In relevant part, ERISA provides:

> [T]he trustee shall have the exclusive authority and discretion to manage and control the assets of the plan, except to the extent that --
>
> > (1) The plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustee shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and are not contrary to this chapter.

29 U.S.C. § 1103(a)(1). In this case, paragraph 5 of the Trust Document states that "discretionary fiduciary responsibilities" are delegated to the administrative committee with regards to company stock. The Trust Plan, which actually implements the terms of the trust, provides that "The Board [of Directors of JSC] shall appoint an Administrative Committee which shall be a Named Fiduciary within the meaning of Section 402 of ERISA and shall be the plan administrator for the purposes of ERISA." Trust Plan, at ¶ 2.01.

The Court finds that the Trust Document and the Trust Plan provide that in matters relating to company stock, Commerce Bank is subject to the direction of the administrative committee, which is a named fiduciary. Plaintiffs admit that defendant was, in fact, a directed trustee. Plaintiffs' Suggestions in Opposition to Summary Judgment, at 10.

Furthermore, ERISA requires that:

> [A] fiduciary shall discharge his duties . . .

> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].

29 U.S.C. § 1104(a)(1)(D). Thus, the Trustee has an obligation under the plan to follow any provisions of the plan that are consistent with ERISA. Failure to comply with the plan documents is a breach of fiduciary duty. Delgrosso v. Spang & Co., 769 F.2d 928 (3rd Cir. 1985). In accordance with paragraph 5 of the Trust Document, Commerce Bank had no discretionary authority to take any action with respect to the JSC stock. The uncontroverted facts show that the administrative committee never directed the Trustee to sell the shares or take any other action with regards to those shares. Therefore, insofar as all allegations in Count I involve the company's failure to sell company stock or to use its proxy power of the stock to correct company affairs, Commerce Bank was following the directions of the Trust Document by not selling or taking any other action in regards to the shares in the absence of instructions from the administrative committee.

Defendant argues that since the Trust Document took away any discretionary authority in regard to the company stock, it had no fiduciary duty in regards to the JSC stock. A person is a fiduciary under ERISA only to the extent that the person has discretionary control, authority or responsibility or renders investment advice to the plan. 29 U.S.C. § 1002(21)(A). A Trustee for a plan is not necessarily a fiduciary for the entire plan. "A person is a fiduciary only with respect to those portions of a plan over which he exercises discretionary authority or control." American Federation of Unions Local 102 v. Equitable Life Assurance Society, 841 F.2d 658, 662 (5th Cir. 1988).

The Court finds that Commerce Bank was not an ERISA fiduciary for the plan insofar as paragraph 5 gives all

discretionary authority for matters involving company stock to the administrative committee. Rather, the Court finds that Commerce Bank was acting as a directed trustee under 29 U.S.C. § 1103(a)(1) as to all matters alleged in Count I. See Ershick v. United Missouri Bank, 948 F.2d 660, 665-69 (10th Cir. 1991). In Ershick, the appeals court upheld a district court determination that a bank, acting as a directed trustee in circumstances nearly identical to those present here, did not violate its duties under ERISA by retaining the stock in the absence of any directions by the administrator to sell it. Id. at 667. The Ershick court held that absent any showing of improper gain at the expense of the plan, the bank would not be liable under ERISA. Id. Those facts are nearly identical to the facts before this Court. Commerce Bank had no discretionary authority to buy, sell or take any other action with respect to the stock in the absence of directions from the administrative committee, and therefore, had no fiduciary duty to act. Furthermore, there is no allegation that Commerce Bank took or failed to take any action in order to profit at the expense of the plan.

Defendant may only be liable for its acts as a directed trustee if the instructions from the directed trustee are improper, or if they contradict the plan or violate provisions of ERISA. Plaintiff has presented no evidence that would lead to the Court to believe that the allocation of authority to the administrative committee was not proper, was contrary to the plan or violated ERISA. See, e.g., Ershick, 668 F.2d at 667. And since there are no "directions" from the committee alleged, there can not be any liability for Commerce's actions with respect to those directions.

Commerce Bank was acting only as a directed trustee with respect to the allegations in Count I. Therefore, in the absence of directions for the administrative committee, Commerce Bank had no authority or fiduciary duty to act with respect to the JSC stock under either the terms of the trust or the provisions of ERISA. Obviously, a critical element of an

action for breach of a fiduciary duty is that the defendant actually owed such a duty to someone or something. In the instant case, plaintiffs have failed to establish that element. The Court therefore holds that, as a matter of law, Commerce Bank owed no fiduciary duty in relation to JSC stock. Summary judgment is appropriate on Count I.

Count II

Count II alleges that Commerce Bank breached its fiduciary duties to the plan when it knew of, but failed to remedy, breaches of fiduciary duty by the administrative committee and thereby enabled the committee to commit further breaches. As with Count I, the allegations in Count II encompass defendant's duty with regard to the sale and voting of the company stock. As discussed above, that duty was delegated to the committee. However, delegation of that duty to the committee does not absolve defendant of all responsibility for the actions of the other fiduciary:

> Upon delegation of fiduciary duties, the fiduciary is not thereafter liable for the acts or omissions of the person carrying out the fiduciary responsibility, except to the extent it participates knowingly in the breach, or fails to act reasonably in discharging its own responsibilities and thereby enables the other fiduciary to commit the breach, or it has knowledge of a breach by such other fiduciary and makes no reasonable efforts under the circumstances to remedy the breach.

Presley v. Blue Cross-Blue Shield of Alabama, 744 F. Supp. 1051, 1058 (N.D. Ala 1990) (citing 20 U.S.C. §§ 1105(a), (c)).

Defendant, in its motion for summary judgment, argues that plaintiffs have not alleged or demonstrated that the administrative committee breached its fiduciary duty, that

defendant knew of that breach, or that defendant could have remedied the breach. Defendant also notes that this case, as originally brought, named the members of the administrative committee as defendants and alleged a count for breach of fiduciary duty against them. That count was subsequently dropped and all members of the administrative committee were dismissed as parties.

After reviewing the complaint, the Court finds that plaintiff has shown no facts which would support their allegations in Count II. Since defendant's allegations demonstrate that an essential element of plaintiffs' case is missing, the burden now shifts to plaintiff to come forward with sufficient evidence to show that there is a factual controversy as to that element or to explain why such evidence is not currently available. Celotex, 477 U.S. at 322-23. For the reasons set forth below, the Court finds that plaintiff has failed to carry this burden.

Plaintiffs' complaint contains the bald assertion that defendant knew of "the breaches of fiduciary duty committed by members of the administrative committee." However, plaintiffs' pleadings are completely devoid of any description of what those alleged breaches were. In addition, plaintiffs have failed to offer any facts suggesting that the administrative committee breached a duty it owed to the trust. Thus, the record does not reflect any allegations, let alone facts, that would support plaintiffs' claims under Count II.

This is in spite of the fact that discovery in this case has closed, a fact that plaintiffs do not dispute in their suggestions in opposition to the present motion. When discovery in a case has been completed, the Court expects that a plaintiff should be able to come forward with any admissible evidence it knows of that supports its claims. If no such evidence exists after the close of discovery, it is unlikely that it will appear at trial. This appears to be the case with Count II.

In their suggestions in opposition, plaintiffs state that they "believe that they will be able to support these claims . . . at trial." Plaintiffs' Suggestions in Opposition to Summary Judgment, at 18. In support of this assertion, plaintiffs state that "[a]t a minimum, Commerce Bank knew that the participants were not receiving timely reports concerning their interests in the Plan," and that these reports were the responsibility of the administrative committee. Id. at 18-19. Plaintiffs also assert that they can prove other undefined breaches about which Commerce Bank supposedly knew. "It is intended that further evidence on this issue can and will be developed at trial." Id.

Plaintiffs do not give any basis for the factual assertion about the reports and the Court cannot accept such unsupported allegations as sufficient evidence of the existence of a genuine issue of material fact. More incredibly, plaintiffs expect the Court to accept blindly their undefined and unfounded assertion that "the Administrative Committee breached other duties. . . ."

As the Court stated before, discovery is complete and plaintiffs should know what other breaches are alleged to have been committed. It appears that plaintiffs hope to arrive at trial with a fishing pole and conduct an expedition to find there what they could not find through discovery. This Court will not grant such a fishing license.

Plaintiffs attempted earlier to sue the administrative committee for breach of fiduciary duty, and for whatever reason, decided to dismiss their case. The Court believes that the reason then is the same reason as now: the plaintiffs cannot make a showing that the administrative committee breached their fiduciary duties and that Commerce Bank knew of those breaches and failed to remedy them.

Plaintiffs have failed to come foreword with a sufficient showing on the record to demonstrate that there is

an issue of material fact left for trial. Therefore, summary judgment will be granted on Count II.

Count III

In Count III, individual plaintiff Anthony T. Maniace alleges that the Trustee failed to make a requested distribution as required under the plan. Defendant argues in its motion for summary judgment that the plan does not impose a responsibility on the Trustee to make disbursements from the Trust Fund other than those made at the direction of the committee. See Trust Plan, at ¶ 3. Defendant states by way of affidavit that plaintiff Maniace called Commerce Bank directly requesting payment from his ESOP account and that Commerce sent him a letter information him that only the plan administrator at JSC could approve a payment. Defendant also states that plaintiff Maniace never followed up with the bank on his first improper request. See Statement of Material Facts, 54-55.

Pursuant to Celotex, defendant has made a strong showing that plaintiff cannot prove a material element of Count III. See Celotex, 477 U.S. at 322-23. This showing shifts the burden to plaintiff to come forward with sufficient evidence to demonstrate that there is a factual dispute for trial. Id. Curiously, plaintiff failed to this part of defendant's motion and, therefore, has failed to rebut defendant's showing that summary judgment is proper. Accordingly, the Court finds that defendant did not have any authority to make the requested distribution to plaintiff Maniace, and could not have made the distribution consistent with ERISA. Therefore, defendant could not have breached a fiduciary duty in failing to make such a payment. Summary judgment on Count III shall be granted.

For the reasons discussed, it is

ORDERED that defendant's motion for summary judgment is GRANTED.

JOSEPH E. STEVENS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: _____, 1993

APPENDIX B

DISTRICT COURT ORDER DENYING MOTION TO ALTER OR AMEND

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

No. 90-5021-CV-SW-8

ANTHONY T. MANIACE, et al.,

Plaintiffs,

v.

COMMERCE BANK OF KANSAS CITY, N. A.

Defendant.

ORDER

Plaintiffs brought suit against Commerce Bank alleging violations of fiduciary duty under ERISA for actions not taken in relation to an employee stock ownership plan. The Court granted summary judgment to defendants on the ground that Commerce Bank had no duty to act as plaintiffs allege it should have. The case is now before the Court on plaintiffs' motion to alter or amend judgment under Fed. R. Civ. P. 59(e).

A motion under Fed. R. Civ. P. 59(e) is available to correct errors of law or fact, but the movant has the burden of showing clearly that the court made a "manifest" error. United States v. Western Elec. Co., 690 F. Supp. 22, 25

(D.D.C. 1988), quoting FDIC v. Meyer, 781 F.2d 160, 1268 (7th Cir. 1986). The motion should not be used simply to relitigate previously raised issues. Id. Finally, the court has a very strong interest in the finality of its judgement. Lussier v. Dugger, 904 F.2d 661, 667 (11th Cir. 1990).

The Court has reviewed the briefs of the parties and finds that plaintiff has not raised any argument or fact that would suggest "manifest error." Accordingly, it is

ORDERED that plaintiffs' motion to alter or amend judgment is DENIED.

JOSEPH E. STEVENS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: December 10, 1993

APPENDIX C

EIGHTH CIRCUIT OPINION AFFIRMING SUMMARY JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-1212

ANTHONY T. MANIACE, on behalf of themselves and all other participants, former participants and beneficiaries of THE JUVENILE SHOE CORPORATION OF AMERICAN EMPLOYEE STOCK OWNERSHIP PLAN similarly situated;

JAMES O. MARQUIE, behalf of themselves and all other participants, former participants and beneficiaries of THE JUVENILE SHOE CORPORATION OF AMERICA EMPLOYEE STOCK OWNERSHIP PLAN similarly situated,

Plaintiffs - Appellants,

vs.

COMMERCE BANK OF KANSAS CITY, N.A.,

Defendant - Appellee

Appeal from the United States District Court for the Western District of Missouri

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Submitted: September 15, 1994

Filed: November 8, 1994

Before McMILLIAN, and MAGILL, Circuit Judges, and BOGUE,* Senior District Judge.

BOGUE, Senior District Judge.

*The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the Western Division of the District of South Dakota, sitting by designation.

Participants in employee stock ownership plan appeal the district court's[4] order dismissing their claims upon summary judgment in favor of trustee Commerce Bank of Kansas City. For the reasons stated below, we affirm.

BACKGROUND

---

[4]Honorable Joseph E. Stevens, Jr., United States District Court Judge for the Western District of Missouri, Southwestern Division.

In 1979, the Juvenile Shoe Company (JSC) converted its existing profit-sharing plan into an employee stock ownership plan (ESOP). To form the ESOP, JSC executed two separate documents: The Employee Stock Ownership Plan and the Employee Stock Ownership Plan Trust ("Plan" and "Trust"). Under the Plan, the JSC Board of Directors was to appoint an Administrative Committee (Committee) to manage and administer the ESOP. This Committee was given a broad grant of powers under the Plan and was specifically designated as both the "named fiduciary" and "plan administrator" for purposes of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. It was further provided that the Plan policy would be to invest in JSC stock and said stock would be the Plan's primary asset.

Appellee Commerce Bank of Kansas City (Commerce) was designated as Trustee of the ESOP in the Trust agreement. Various provisions of the Trust granted general responsibilities, powers, and authority to the Trustee, permitting it to invest in savings accounts, certificates of deposit, JSC stock, real estate, securities of companies other than JSC, bonds or mortgages. Critical to the present appeal, the foregoing general grant of authority to the Trustee was limited with respect to JSC stock by Paragraph 5 of the Trust, which stated:

> Anything herein to the contrary notwithstanding the Trustee shall as directed by the Committee, from time to time, and upon such terms and conditions as directed by the Committee, purchase, sell, retain, distribute or otherwise act with respect to Company Stock . . . The Trustee's duties and responsibilities with respect to the purchase, sale, retention, distribution or other action with respect to Company Stock . . . shall be limited to effecting the direction of the Committee, discretionary, fiduciary

responsibility with respect to such matters being hereby allocated to the Committee. (emphasis added)

Throughout the 1980s the sales, net worth, and profits of JSC generally declined. In 1982 Gale Pate, Jr. (Pate) succeeded his father as company president and CEO. Pate was apparently an ineffective CEO and upon his own motion, the JSC Board of Directors named Charles Allison (Allison) as company president. Allison initiated changes in JSC policy, including an expansion into the retail shoe business. As a method of cutting costs, JSC management asked for wage concessions from union employees which precipitated a lengthy and costly labor strike. Attempts to secure foreign sources to fill shoe orders during the strike were disastrous; the replacement products being of poor quality and delivered late to JSC customers.

Relationships among high-ranking JSC officials progressively deteriorated, as did the financial status of the company. Pate was discharged by the Board as CEO and subsequently attempted to call a special shareholders meeting to remove the Board. The proxy fight was eventually aborted and no meeting ever took place. In September 1988, Allison was fired by the Board. A consulting firm was brought in to turn JSC around or sell it. Several proposals for the sale of all or part of JSC were prepared and presented to the Board. The only proposal accepted by the Board was the sale of one retail chain held by JSC. JSC filed for Chapter 11 bankruptcy protection in March 1989 and eventually filed for Chapter 7 bankruptcy in August 1989. The JSC stock in the ESOP was rendered worthless.

Commerce took an essentially hands-off approach to the business problems encountered by JSC. As part of its trustee responsibilities, Commerce annually reviewed JSC's financial statements. When it received the 1987 financial statement in early 1988, it noted that JSC had lost $3 million

the previous year. A meeting was held between JSC officials and members of Commerce's trust department. Commerce's concerns regarding the JSC's financial health were not quelled and communication problems between the parties in existence at the time of the meeting increased thereafter. Commerce submitted its resignation as Trustee on July 12, 1988, effective sixty days thereafter. As of September 6, 1988, the Trust assets were insufficient to pay out participant's benefits.

Appellants filed the present lawsuit alleging that Commerce failed to fulfill its fiduciary obligations as Trustee to prudently manage and protect Plan assets. Appellants further alleged that Commerce breached fiduciary obligations when it knew of, but failed to remedy, breaches of fiduciary duty committed by the Committee, thereby enabling the Committee to commit further breaches. The appellant's primary accusations appear to involve Commerce's retention of large amounts of JSC stock as Plan Trustee despite the stock's declining value, as well as Commerce's overall lack of participation in company finances and management feuds. The district court found no fiduciary duties existed with respect to the JSC stock and granted Commerce's motion for summary judgment dismissing the action. The district court further found the appellants asserted no facts which would indicate a breach on the part of the Committee or that Commerce knew of any such breach.

DISCUSSION

We apply de novo review to a grant of summary judgment. United States v. Tharp, 973 F.2d 619, 620 (8th Cir. 1992). In reviewing the matter, the facts are to be viewed in the light most favorable to the nonmoving party, who is to be given the benefit of all reasonable inferences which may be made from the facts disclosed in the record. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53 (1986).

Labels are important in making a determination of this matter. With respect to trustees, ERISA outlines the duties and ability of plans to allocate the same. 29 U.S.C. § 1103(a)(1), states in part:

> [T]he trustee . . . shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that -
>
> (1) the plan expressly provides that the trustee or trustees are subject to direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and are not contrary to this chapter . . .

There is no dispute that Commerce was a "directed trustee" with respect to the JSC stock in the ESOP and that the Committee was the "named fiduciary." The problem is what duties are attending the status of directed trustee.

Appellants allege Commerce breached fiduciary duties owed to participants in the JSC ESOP outlined in ERISA. 29 U.S.C. § 1104(a)(1)(B), provides in part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and - . . .
>
> (b) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . .

Appellants contend that by retaining JSC stock which was declining in value and choosing not to become involved in company financial matters, Commerce violated § 1104 and its "prudent man" standard. The district court granted summary judgment in favor of Commerce as to this claim by concluding

that Commerce was not an ERISA fiduciary with respect to the JSC stock held by the ESOP; i.e. because Commerce was not a fiduciary, no fiduciary duties were owing. We agree.

> A person is an ERISA fiduciary only to the extent that:
>
> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he renders investment advice for a fee or other compensation . . ., or
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.§ 1002(21)(A). Clearly, discretion is the benchmark for fiduciary status under ERISA. Importantly, a trustee for a plan is not necessarily a fiduciary for the entire plan. "[F]iduciary status under § 1002(21)(A) is not an 'all or nothing concept. . . . [A] court must ask whether a person is a fiduciary with respect to the particular activity in question.'" Kerns v. Benefit Trust Life Ins. Co., 992 F.2d 214 (8th Cir. 1993), quoting Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992); American Fed'n of Unions Local 102 v. Equitable Life Assurance Society, 841 F.2d 658, 662 (5th Cir. 1988) ("A person is a fiduciary only with respect to those portions of a plan over which he exercises discretionary authority or control.")

While the current Trust document granted general powers to Commerce, paragraph 5 of that document explicitly limits Commerce's discretion vis a vis JSC stock. Commerce had no discretion and could only act at the direction of the Committee. As such, Commerce could not be a fiduciary (nor breach fiduciary duties) with respect to the JSC stock.

Notwithstanding Commerce's lack of fiduciary status, as an ERISA directed trustee, it may only act upon directions from the Committee (named fiduciary) "which are made in accordance with the terms of the plan and are not contrary to this chapter . . ." 29 U.S.C. § 1103(a)(1). The remaining question in this case is whether Commerce followed this statutory mandate.

We find that the appellants have failed to establish that Commerce's handling of the ESOP was contrary to Plan directives or contrary to ERISA. The obligations of a directed trustee are something less than that owed by typical fiduciaries. Commerce was not required to weigh the merits of an investment in JSC stock against all other investment options every time it was directed to purchase said stock by the Committee. Ershick v. United Missouri Bank, 948 F.2d 660, 665 (10th Cir. 1991). Section 1103(a)(1) establishes the standard to be followed by directed trustees, and under the present facts it cannot be said that purchase of JSC stock violated the Plan or was contrary to ERISA.

FirsTier Bank, N.A. v. Zeller, 16 F.3d 907 (8th Cir. 1994), does not command a different conclusion. In FirsTier we faced a situation in which the trustee bank had general fiduciary responsibility for management of all plan assets, but was subject to direction of the plan sponsor to make loans to participants out of plan assets. Loans were in fact made at the sponsor's direction and, following the company's bankruptcy, the bank was sued by borrowing participants for breach of fiduciary duty. The bank defended by claiming to be a directed trustee with no attendant fiduciary responsibilities. Trustee responsibilities in that case were significant, with the bank being "authorized and directed to hold, manage, invest, and account for all plan assets." Id. at 911 (emphasis added). Under those circumstances we concluded that the ERISA section defining duties of directed trustees "modifies, but . . . does not eliminate the trustee's fiduciary duty when handling plan assets." Id. We found the "prudent man standard of

care" remained despite the bank's status as a directed trustee. Id.

Unlike the situation in FirsTier, Commerce had no discretion nor control with respect to JSC stock, the central asset in the ESOP at issue. As such, Commerce does not fit within the ERISA definition of a fiduciary and their conduct is controlled exclusively by § 1103(a). As previously stated, the appellants have failed to establish that Commerce's conduct at the Committee's direction was not "in accordance with the terms of the plan" or was "contrary to" provisions of ERISA. Imposing any "residual" duties on Commerce would, in effect, abrogate the distinction between trustees and directed trustees clearly intended by ERISA.

Appellant's count two alleges Commerce breached fiduciary duties to the Plan when it know of, but failed to remedy, breaches of fiduciary duty by the Committee and thereby enabled the Committee to commit further breaches. This count, like count one, involves actions or inactions with respect to sale and voting of JSC stock. As previously noted, fiduciary responsibility vis a vis the stock was expressly delegated under plan documents to the Administrative Committee. Commerce's liability for acts of the Committee is judged as follows:

> Upon delegation of fiduciary duties, the fiduciary is not thereafter liable for the acts or omissions of the person carrying out fiduciary responsibility, except to the extent it participates knowingly in the breach, or fails to act reasonably in discharging it own responsibilities and thereby enables the other fiduciary to commit the breach, or it has knowledge of a breach by such other fiduciary and makes no reasonable efforts under the circumstances to remedy the breach.

Presley v. Blue Cross-Blue Shield of Alabama, 744 F. Supp. 1051, 1058 (N.D. Ala 1990) (citing 29 U.S.C. §§ 1105(a), (c)).

To succeed under count two, appellants must initially establish breaches on the part of the Committee in discharging their duties under the Plan. In addition, the appellants must then show that Commerce either participated in said breaches or knew of the breaches and did nothing to remedy them. The district court granted Commerce's motion for summary judgment finding appellants failed to plead or offer facts suggesting that the Committee breached any duty owed to the trust. We agree. Appellant's can cite to no actions of the Committee which would rise to the level of breach of fiduciary duty. The lengthy recitation of options available to Commerce cited in appellant's brief (e.g., sue for injunctive relief in federal court, contact the Department of Labor, bring a derivative shareholder action), is contrasted by the negligible attention devoted to specific misdeeds on the part of the Committee. Because there is nothing to indicate the Committee breached fiduciary duties, let alone that Commerce participated in or knew of such breaches, the district court properly granted summary judgment dismissing this count.

CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

APPENDIX D

EIGHTH CIRCUIT OPINION DENYING MOTION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1212WMKC

Anthony T. Maniace, etc., et. al.,

Appellants,

vs.

Commerce Bank of Kansas City, N.A.,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 19, 1994

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

STATUTES

1. 29 U.S.C. §1002(21)(A), ERISA §3(21)(A)

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

2. 29 U.S.C. §1103(a), ERISA 403(a)

Act Sec. 403. (a) Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that —

> (1) the plan expressly provides that the trustee or trustees are subject to the direction of named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3).

3. 29 U.S.C. §1104(a), ERISA §404(a)

Act Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title of Title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding

of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

4. 29 U.S.C. §1105; ERISA §405

Act Sec. 405. (a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Act Sec. 405. (b)(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2), if the assets of a plan are held by two or more trustees —

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities,

obligations or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more that one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1).

Act Sec. 405. (c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or

omission of such person in carrying out such responsibility expect to the extent that —

(A) the named fiduciary violated section 404(a)(1) —

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3).

Act Sec. 405. (d)(1) If an investment manager or managers have been appointed under section 402(c)(3), then, notwithstanding subsections (a)(2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

5. 29 U.S.C. §1110(a), ERISA §410(a)

Act Sec. 410. (a) Except as provided in section 405(b)(1) and 405(d), any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(2)

FILED
APR 19 1995
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No. 94-1578

In The

Supreme Court of the United States

October Term, 1994

ANTHONY T. MANIACE, et al.,

Petitioners,

v.

COMMERCE BANK OF KANSAS CITY, N.A.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a directed trustee of an Employee Stock Ownership Plan governed by ERISA, which may act as to company stock only in accordance with instructions from a named fiduciary, has fiduciary duties within the meaning of ERISA with respect to such stock?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Background 1

B. Proceedings Below 5

SUMMARY OF THE ARGUMENT 7

REASONS FOR DENYING THE WRIT 10

I. Certiorari Should Be Denied Because the Eighth Circuit's Decision In *Maniace* Is Totally Consistent With the Express Mandates of ERISA and with Judicial Precedents on the Issue of Directed Trustees. 10

II. The *Maniace* Decision Is Consistent With Public Policy and Does Not Immunize Directed Trustees From Liability. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 16

Ershick v. United Missouri Bank, 948 F.2d 660 (10th Cir. 1991) 17, 20, 21

FirsTier Bank, N.A. v. Zeller, 16 F.3d 907 (8th Cir.), *cert. denied sub nom. Vercoe v. FirsTier Bank, N.A.*, ___ U.S. ___, 115 S. Ct. 194 (1994) 17

Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994) 22

Kerns v. Benefit Trust Life Ins. Co., 922 F.2d 214 (8th Cir. 1993) 6, 11, 19

Maniace v. Commerce Bank, N.A., 40 F.3d 264 (8th Cir. 1994) ..... *passim*

Mertens v. Hewitt Associates, ___ U.S. ___, 124 L.Ed.2d 161, 113 S. Ct. 2063 (1993) 22

Robbins v. First American Bank, 514 F. Supp. 1183 (N.D. Ill. 1981) 12

STATUTES

29 C.F.R. § 2509.75-8 13

29 U.S.C. § 1002(21)(A) 7, 11, 12, 14, 19

29 U.S.C. § 1103 ..... *passim*

29 U.S.C. § 1110(a) 16

29 U.S.C. § 1132 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Restatement (Second) of Trusts § 185 (1959) 20, 21

Scott and Fratcher, IIA *Scott on Trusts* § 185 (4th ed. 1987) 20

No. 94-1578

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ANTHONY T. MANIACE, et al.,

Petitioners,

v.

COMMERCE BANK OF KANSAS CITY, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Commerce Bank of Kansas City, N.A. ("Commerce Bank"), respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

A. Background

Petitioners are former participants and beneficiaries of the Juvenile Shoe Corporation of America ("Juvenile Shoe") Employee Stock Ownership Plan ("ESOP" or

"Plan") who had earned vested retirement benefits under the Plan. Respondent Commerce Bank was the Trustee of the Plan beginning in 1979 when Juvenile Shoe converted its profit-sharing plan into an ESOP. A-21.

In forming the ESOP, Juvenile Shoe executed the Plan document and the Employee Stock Ownership Plan Trust ("Trust" or "Trust document"). The Plan document instructed that the ESOP was "designed to invest primarily Company Stock and that shall be the investment policy of the Plan." Plan Document at § 2.08. Section 2.01 of the Plan document provided that the "Board [of Directors of Juvenile Shoe] shall appoint an Administrative Committee which shall be a 'named fiduciary' within the meaning of Section 402 of ERISA and shall be the Plan Administrator for purposes of ERISA." Among the duties assigned to the Administrative Committee were the following powers:

(1) General management of the Plan and the sole, final and absolute right to reconcile any inconsistency in the Plan;

(2) Interpret and construe the provisions of the Plan in all particulars;

(3) Take all actions and make all decisions and determinations necessary under the Plan;

(4) Direct the Trustee to invest and reinvest funds of the Trust Fund in Company Stock upon such terms and conditions as directed by the Committee and the Trustee shall act as directed by the Committee; and

(5) Direct the Trustee with respect to the distribution, and disbursement from, the Trust Fund.

Plan Document at §§ 2.03, 2.08. The Administrative Committee was thus "given a broad grant of powers under the Plan and was specifically designated as both the 'named fiduciary' and 'plan administrator' for purposes of [ERISA]." A-21. In particular, Paragraph 4 of the Plan document specified that the Administrative Committee was required to direct the Trustee to invest and reinvest Trust funds in Company stock, and the Trustee was required to act as directed by the Committee.

Commerce Bank was named Trustee of the ESOP on February 26, 1979. The Trust document instructed that "[t]he Trustee shall be charged with no responsibility whatever respecting the making of disbursements from the Trust Fund other than to comply with the directions of the Committee. The Trustee shall not be responsible for the administration of the Plan."

The Trust document contained general language permitting the Trustee to invest in savings accounts, certificates of deposit, Juvenile Shoe stock, real estate, securities of companies other than Juvenile Shoe, bonds or mortgages. The Trust document also included general language permitting the Trustee to vote securities held by it.

Those general provisions were applicable only to management of the portion of the ESOP which was not invested in Juvenile Shoe stock. Central to the issues presented in the petition for writ of certiorari, Paragraph 5 of the Trust document limited the general grant of authority to the Trustee with respect to Juvenile Shoe stock:

> Anything herein to the contrary notwithstanding, the Trustee shall as directed by the Committee, from time to time, and upon such terms and conditions as directed by the Committee, purchase, sell, retain, distribute or otherwise act with respect to Company Stock. . . . The Trustee's duties and responsibilities with respect to the purchase, sale, retention, distribution or other action with respect to Company Stock . . . shall be limited to effecting the direction of the Committee, discretionary, fiduciary responsibility with respect to such matters being hereby allocated to the Committee.

A-6 - A-7.

As Trustee, Commerce Bank performed the functions delegated to it by the Plan, subject to the requirements of the Trust. In particular, Commerce Bank held Juvenile Shoe shares for safe-keeping, maintained records on the number of shares held by each Plan participant, and prepared accounting records for use by Juvenile Shoe.

Throughout the 1980s, Juvenile Shoe faced increased competition from lower priced import shoes. For a decade prior to 1988, the number of shoes sold by Juvenile Shoe had declined steadily. Although profits and net worth had remained steady, they too began to decline in the mid-1980s.

As part of its responsibilities as Trustee, Commerce Bank reviewed Juvenile Shoe's financial statements annually. A-22. When the Bank received Juvenile Shoe's 1987 financial statements, it noted that the Company had lost $3 million the prior year. *Id.* Even after meeting with representatives from Juvenile Shoe, Commerce Bank was

concerned about the Company's financial health, including concerns that Juvenile Shoe's complexion had changed from a manufacturing business with a relatively dominant position in medical and children's shoes to an importer in the retail shoe business. A-23.

Commerce Bank submitted its resignation as Trustee in accordance with Paragraph 9 of the Trust document on July 12, 1988, to be effective 60 days thereafter. *Id.* No successor trustee was ever appointed.

In March 1989, Juvenile Shoe filed for Chapter 11 bankruptcy protection. After Juvenile Shoe's primary lender refused to extend additional credit after August 1989, Juvenile Shoe filed for Chapter 7 bankruptcy. After the Company failed in 1989, the Juvenile Shoe stock and the entire balance of the Petitioners' retirement benefits became worthless.

B. Proceedings Below

In July 1990, petitioners filed a Complaint pursuant to Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, against the Administrative Committee and Commerce Bank, alleging breaches of fiduciary duties under ERISA. Petitioners dismissed their cause of action against the members of the Administrative Committee without prejudice.

After extensive discovery, Commerce Bank filed a motion for summary judgment on all counts. The District Court granted the motion, rejecting, among other contentions, petitioners' allegation that Commerce Bank had fiduciary duties within the meaning of ERISA with

respect to the Juvenile Shoe stock.[1] A-5. The District Court also denied Petitioners' subsequent motion to alter or amend the judgment. A-11 – A-12.

On appeal, the Eighth Circuit properly concluded that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock because it was a directed trustee for the ESOP, and its discretion was explicitly limited vis-a-vis the Juvenile Shoe stock by Paragraph 5 of the Trust document. A-25. *See also* Plan Document at §§ 2.03, 2.08 (Administrative Committee was required to direct the Trustee to invest in Company stock, and the Trustee was required to follow the Committee's directions). In so holding, the Eighth Circuit correctly observed that " 'fiduciary status under § 1002(21)(A) is not an "all or nothing concept . . . [A] court must ask whether a person is a fiduciary with respect to the particular activity in question." ' " *Maniace v. Commerce Bank, N.A.*, 40 F.3d 264 (8th Cir. 1994) (A-25), *quoting Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214 (8th Cir. 1993) (quotations omitted).

Based on the well-developed factual record, the Eighth Circuit found that Commerce Bank lacked discretion with respect to the Juvenile Shoe stock by virtue of

---

[1] In the District Court and in the Eighth Circuit, Commerce Bank acknowledged that it had ERISA fiduciary duties with respect to the Trust assets (primarily cash) other than the Juvenile Shoe stock. Petitioners did not allege that Commerce Bank had breached any fiduciary duties with respect to the non-stock assets, except insofar as those assets were used to acquire Juvenile Shoe stock. Therefore, the petition for writ of certiorari does not address Commerce Bank's ERISA fiduciary duties with respect to Trust assets other than the Juvenile Shoe stock.

Paragraph 5 of the Trust document and only acted at the direction of the Administrative Committee. A-25. "As such, Commerce could not be a fiduciary (nor breach fiduciary duties) with respect to the JSC stock." A-25.

The Eighth Circuit also concluded in *Maniace* that petitioners had failed (1) to establish that Commerce Bank's handling of the ESOP was contrary to Plan directives or ERISA, or (2) to present evidence that the Administrative Committee had breached a fiduciary duty, much less that Commerce Bank had participated in or knew of such breaches. A-26 – A-28. For these reasons, as well, the Eighth Circuit affirmed the District Court's Order granting summary judgment for Commerce Bank.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because (1) Commerce Bank did not have fiduciary duties with respect to the Juvenile Shoe stock, and (2) Commerce Bank complied with its responsibilities under the Plan and Trust documents and acted in accordance with ERISA.

First, Commerce Bank can be determined to have "fiduciary" duties within the meaning of ERISA only by applying the factors set forth in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). After extensive discovery in the District Court and the entry of summary judgment for Commerce Bank, the Eighth Circuit concluded that Commerce Bank did not have the discretionary authority or control with respect to the Juvenile Shoe stock necessary to satisfy the elements of 29 U.S.C. § 1002(21)(A). The

evidence developed in this case thus supports the Eighth Circuit's proper conclusion that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock.

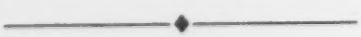
Petitioners have also contended in their second Question Presented as discussed in arguments (5) and (6) of their petition that a decision that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock would thwart public policy by absolving the Bank of all responsibilities under the Plan, particularly with respect to the investment of Plan assets. Contrary to petitioners' position, the provisions of ERISA as well as public policies which underly the statute do not require that a directed trustee have fiduciary duties. Instead, the statute simply requires that *some* fiduciary be responsible for plan assets.

In this case, Commerce Bank had fiduciary duties with respect to certain Plan assets, but the Administrative Committee possessed the fiduciary responsibilities for the Juvenile Shoe stock. That allocation of duties under the Plan and Trust documents was consistent with ERISA and the public policies underlying the legislation.

Moreover, the District Court's holding that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock and the Eighth Circuit's affirmation of that holding did not leave Commerce Bank free of *all* responsibilities as petitioners imply in their second Question Presented. As the Eighth Circuit recognized, Commerce Bank was subject to – and complied with – the statutory mandates in ERISA as set forth in 29 U.S.C. § 1103.

Public policy would actually be harmed by the standard urged by petitioners which would impose conflicting duties on directed trustees. In particular, a directed trustee who investigated independently each direction from the fiduciary charged with certain action could be found on the one hand to have breached a fiduciary duty by failing to follow the terms of the plan. That same trustee could then be found liable on the other hand for breaching a fiduciary duty by following the express terms of the plan and thereby failing to conduct the independent investigation petitioners advocate in this case. Public policy does not support placing directed trustees in such an untenable position, and instead supports the holding below that a directed trustee who complies with the terms of the plan and acts in accordance with ERISA as required by 29 U.S.C. § 1103 is not liable to Plan participants and beneficiaries.

In summary, both the District Court and the Eighth Circuit were presented with a well-developed factual record which supported the conclusion that Commerce Bank had satisfied its obligations under the Trust and the mandates of ERISA. Petitioners' professed fears that directed trustees who do not have fiduciary duties within the meaning of ERISA are immunized from all liability are misplaced, and certiorari should not be granted.



REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because the Eighth Circuit's Decision In *Maniace* Is Totally Consistent With the Express Mandates of ERISA and with Judicial Precedents on the Issue of Directed Trustees.

Petitioners' petition for writ of certiorari carries the theme that if Commerce Bank does not have "fiduciary" duties with respect to the Juvenile Shoe stock, then it has *no* duties or obligations under ERISA. To the contrary, Commerce Bank clearly owed duties to the Plan participants and beneficiaries. In particular, Commerce Bank was at all times required to comply with the Plan and Trust documents and to act in accordance with ERISA. *See* 29 U.S.C. § 1103(a)(1). Based on the extensive factual record presented, both the District Court and the Eighth Circuit concluded that Commerce Bank satisfied its duties under the terms of the Plan and the Trust and acted in accordance with ERISA.

Petitioners focus the substantial part of their attention in the petition for writ of certiorari on the first part of the Eighth Circuit's decision which addressed whether Commerce Bank owed fiduciary duties with respect to the Juvenile Shoe stock. In so doing, petitioners downplay the Eighth Circuit's significant conclusion that petitioners "failed to establish that Commerce's handling of the ESOP was contrary to Plan directives or contrary to ERISA." A-26.

That holding and the Eighth Circuit's supporting analysis reveal the flaw in petitioners' second Question Presented which is premised on the notion that *all* of

Commerce Bank's duties were allocated to the Administrative Committee, thereby absolving the Bank of *all* responsibilities with respect to the investment of Plan assets. As the District Court and the Eighth Circuit properly found, Commerce Bank owed certain duties to the Plan and its beneficiaries and participants, and the Bank fulfilled those duties in compliance with the terms of the Plan and Trust documents and the provisions of ERISA.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), lies at the heart of the petition for writ of certiorari. That provision instructs that "a person or entity is an ERISA fiduciary only to the extent that he (i) exercises discretionary authority or discretionary control with respect to the management of the plan or exercises authority or control with respect to the management or disposition of plan assets, (ii) renders investment advice for a fee or other compensation, or (iii) has discretionary authority or discretionary responsibility in the administration of the plan. The Eighth Circuit has recognized that "fiduciary status under § 1002(21)(A) is not an 'all or nothing concept. . . . [A] court must ask whether a person is a fiduciary with respect to the particular activity in question.' " *Kerns v. Benefit Trust Life Ins. Co.*, 922 F.2d at 217 (quotation omitted), *cited in Maniace*, A-25.

Application of the factors in ERISA § 3(21)(A) presents factual issues to be resolved on a case-by-case basis. The Eighth Circuit's decision that Commerce Bank did not owe fiduciary duties with respect to the Juvenile Shoe stock was based on the extensive record developed in

discovery and presented with Commerce Bank's summary judgment motion. Certiorari is neither necessary nor warranted in order to analyze the factual record and reexamine Commerce Bank's liability.

The evidence presented below demonstrated that Commerce Bank did not have discretionary authority, control or responsibility with respect to the Juvenile Shoe stock. Instead, both the Plan document and Paragraph 5 of the Trust document explicitly limited Commerce Bank's discretion with respect to the Juvenile Shoe stock, and both the District Court and the Eighth Circuit found that the Bank had acted only at the direction of the Administrative Committee. A-10 – A-11, A-26. Based on the factual record, the Eighth Circuit properly concluded that Commerce Bank did not owe fiduciary duties with respect to the Juvenile Shoe stock. A-25.

The United States District Court for the Northern District of Illinois has undertaken a similar analysis with respect to a bank acting as a directed trustee. *See Robbins v. First American Bank*, 514 F. Supp. 1183 (N.D. Ill. 1981). In *Robbins*, plaintiff trustees of a union pension fund asserted a cause of action against the bank which had administered a loan, alleging that the defendant bank had breached its statutory duty as a fiduciary within the meaning of ERISA. *Id.* at 1189. The District Court applied the factors set forth in 29 U.S.C. § 1002(21)(A), concluding that the bank was not a fiduciary with respect to the loan in question. *Id.* at 1190. The District Court found the following facts relevant to its conclusion:

> In the instant case, the bank was merely a servicing agent for a particular investment. The

> bank was never itself involved with the administration or management of the fund itself or in making its investment policies and decisions. The bank was required to fulfill various ministerial functions respecting one investment, including making advances to the borrower and remitting loan repayments to plaintiffs.
>
> * * *
>
> At most, plaintiffs can show that the participation agreement itself gave the bank decision-making authority binding plaintiffs when the parties failed to agree within a reasonable time upon action to be taken concerning an issue which materially affected their interests. . . . Nonetheless, this authority is insufficient to constitute "authority or control respecting management or disposition of [the plan's] assets" within the meaning of [ERISA].

Id. at 1190-91.

Department of Labor regulations further support the fact that a bank performing ministerial functions for an employee benefit plan is not an ERISA fiduciary.

> [A] person who performs purely ministerial functions . . . for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such a person does not have discretionary authority or discretionary control respecting management of the plan. . . .

29 C.F.R. § 2509.75-8. Functions considered by the Department of Labor to be "ministerial" rather than of a "fiduciary" nature include (a) applying rules to determine

eligibility for benefits, (b) maintaining participant records, (c) preparing reports required by government agencies, (d) advising participants of their rights and options under the plan, (e) preparing reports concerning participants' benefits, and (f) making recommendations to others for decisions with respect to plan administration. *Id.* at D-2.

As set forth in the Statement of Facts, Commerce Bank's responsibilities with respect to the Juvenile Shoe stock were limited exclusively to ministerial tasks. For example, each year Commerce Bank prepared a Certificate for each ESOP participant. The Certificate reflected the number of Juvenile Shoe shares held for the benefit of the participant, the value of those shares as determined by an independent appraisal firm not associated with Commerce Bank, and any cash balance in the account. Both the District Court and the Court of Appeals below applied the factors set forth in 29 U.S.C. § 1002(21)(A) to the evidence developed in determining that Commerce Bank's responsibilities for the Juvenile Shoe stock did not rise to the level of "fiduciary" duties.

In seeking a writ of certiorari, petitioners nevertheless complain that the Eighth Circuit erred in concluding that Commerce Bank did not owe fiduciary duties with respect to the Company stock because that holding:

(1) violates the express mandates of ERISA;

(2) is contrary to prior Eighth Circuit precedent on the issue of directed trustees and fiduciary status; and

(3) is inconsistent with the rulings of the United States Supreme Court on the importance of considering common law trust principles and with those well-established common law principles of trust law which apply under ERISA.

Petitioners' contentions lack merit, and their petition for writ of certiorari should be denied.

First, the Eighth Circuit's decision in this case does not violate the express mandates of ERISA. As stated above, ERISA § 3(21)(A) defines fiduciary activities for entities such as Commerce Bank. The evidence presented to the District Court demonstrated that Commerce Bank neither had the discretion nor performed the type of functions which would render it an ERISA fiduciary with respect to the Juvenile Shoe stock.

Petitioners attempt to bolster their argument on page six of their petition by contending that ERISA § 403(a) supports the notion that a trustee is, by definition, an ERISA fiduciary. To the contrary, ERISA § 403(a)(1) addresses the duties of a trustee of an ERISA plan and does not define a trustee as an ERISA fiduciary. 29 U.S.C. § 1103(a)(1). That provision required Commerce Bank to follow any directions received from the Administrative Committee so long as the directions were "proper," "made in accordance with the plan," and "not contrary to [ERISA]."

In support of their argument, petitioners also rely on a 1985 United States Supreme Court decision for the principle that "trust documents cannot excuse trustees from their duties under ERISA, and . . . trust documents must generally be construed in light of ERISA's policies."

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 568 (1985), *cited in* Petition at 8. The Supreme Court decision in *Central States* does not support the proposition that a trustee is, by definition, an ERISA fiduciary. Instead, the Supreme Court concluded in *Central States* that the trustees' interpretation of the trust document was reasonable and consistent with ERISA. 472 U.S. at 569.

On page 9 of their petition, petitioners also argue that ERISA § 410(a), 29 U.S.C. § 1110(a), prohibits the allocation of duties required by the Juvenile Shoe ESOP documents. Petitioners misinterpret ERISA § 410(a), which has as its main purpose the principle that a fiduciary cannot be indemnified by the plan for breach of duty or exculpated from liability therefor. By contrast, ERISA § 403(a)(1) is relevant to the issues presented in this case and permits a plan document to allocate responsibility among different persons or entities.

In concluding point (1) in their petition for writ of certiorari, petitioners complain that the Eighth Circuit's opinion in this case, which holds that the language of the Trust document operated to relieve Commerce Bank of its fiduciary duties, is contrary to ERISA statutes and public policy. As discussed above, petitioners fail to recognize that ERISA permits the allocation of duties among those bearing responsibilities under an ERISA plan. *See* 29 U.S.C. § 1103. In this case, both the Plan document and the Trust document designated the Administrative Committee as the entity with responsibility for the Juvenile Shoe stock. *See* Plan Document; Trust Document, Paragraph 5. Under those provisions, Commerce Bank was required to hold the Company stock and to invest in Company stock when directed. ERISA § 404(a)(1)(D), 29

U.S.C. § 1104(a)(1)(D) instructs that Commerce Bank *must* follow provisions of the Plan which are consistent with ERISA. The Juvenile Shoe Plan allocated fiduciary duties among the various fiduciaries of the Plan. All discretionary authority and responsibility with respect to Juvenile Shoe stock was allocated to the Administrative Committee. Commerce Bank's conduct in complying with directions from the Administrative Committee satisfied its obligations under ERISA.

Petitioners have also failed to explain in their quest for certiorari that the Eighth Circuit's decision explicitly recognized the responsibilities and duties owed by directed trustee Commerce Bank pursuant to 29 U.S.C. § 1103. Because the evidence in this case demonstrated that Commerce Bank complied with its duties under § 1103, the Eighth Circuit properly concluded that the Bank satisfied its duties in accordance with the relevant provisions of ERISA.

Second, petitioners contend that the Eighth Circuit's decision in *Maniace* is contrary to Eighth Circuit precedent on the issue of directed trustees and fiduciary status. *See* Petition at 9. Petitioners' argument is based primarily on the 1994 Eighth Circuit decision in *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907 (8th Cir.), *cert. denied sub nom. Vercoe v. FirsTier Bank, N.A.*, ___ U.S. ___, 115 S. Ct. 194 (1994). In its decision below, the Eighth Circuit distinguished *FirsTier Bank* on grounds that the evidence in this case demonstrated that unlike FirsTier Bank, Commerce Bank had no discretion or control with respect to the Juvenile Shoe stock. A-26 – A-27. Therefore, Commerce Bank did not satisfy the fiduciary status test set forth in 29 U.S.C. § 1002(21)(A) as had FirsTier Bank. *Cf. Ershick v. United*

Missouri Bank, 948 F.2d 660, 669 (10th Cir. 1991) (bank was not liable to participants in ESOP because its actions were allowed by the ESOP and undertaken pursuant to the directions of the plan administrator).

Under ERISA and relevant judicial decisions addressing the duties of directed trustees, because Commerce Bank had no duties under the Plan or Trust documents with respect to the Juvenile Shoe stock except to follow the directions of the Administrative Committee, Commerce Bank was required to follow the directions unless it was clear on the face of the instructions that they involved a prohibited transaction or a breach of duty by the directing fiduciary. Similarly, under ERISA Commerce Bank, as a directed trustee, should not have acted in the absence of direction from the Administrative Committee unless it received information that the absence of direction constituted a breach of fiduciary duty by the Committee.

By contrast, the standard urged by petitioners would expose directed trustees to conflicting duties and unwarranted liability. Failure to follow the terms of the Plan and Trust documents constitutes a breach of duty. Therefore, if Commerce Bank had attempted to take some action with the Juvenile Shoe stock without direction from the Administrative Committee or contrary to an Administrative Committee direction, the Bank would have been subject to suit by the Company, the Committee, and participants for breach of duty. On the other hand, petitioners have sued Commerce Bank for following the express terms of the governing documents. Petitioners' efforts are contrary to the language and intent of ERISA and should be rejected.

Moreover, if a trustee must investigate each direction as if it were its own, the protection provided by ERISA § 403(a)(1) would be meaningless. Such a holding would expose directed trustees to unacceptable duties and liabilities, not only with respect to employee stock ownership plans, but with respect to all retirement plans which provide for direction from another named fiduciary.

On page 13 of their petition, petitioners address the factors set forth in 29 U.S.C. § 1002(21)(A) as discussed in *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d at 214. Although petitioners conclude the argument on page 13 of their petition with the bold assertion that the trustee of an ERISA plan is by definition a fiduciary, application of the facts in this case to the factors set forth in 29 U.S.C. § 1002(21)(A) addressed in *Kerns* and cited by petitioner demonstrates that Commerce Bank did not have fiduciary duties with respect to the Juvenile Shoe stock for the reasons discussed more fully above.

Third, petitioners contend without support that "the Eighth Circuit declined to consider or apply the established trust law principles which provide that a directed trustee continues to owe strict fiduciary responsibilities to the beneficiaries of the trust." Petition at 14. As explained above, the definition of a "fiduciary" under ERISA is set forth in 29 U.S.C. § 1002(21)(A). Those factors are no doubt derived, in substantial part, from common law trust principles. The Eighth Circuit applied the factors set forth in the statute in determining that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock.

The common law trust principle on which petitioners rely most heavily as support for their argument is § 185 of *Scott on Trusts*, which petitioners cite for the proposition that directed trustees are fiduciaries within the meaning of ERISA. *See* Petition at 15-16, *quoting* Scott and Fratcher, IIA *Scott on Trusts* § 185 (4th ed. 1987). Contrary to the conclusion petitioners draw from § 185, the types of duties discussed by Scott and Fratcher reflect the types of duties and responsibilities placed on trustees by 29 U.S.C. § 1103, and do not lead to the conclusion that directed trustees are defined as ERISA fiduciaries.

First, *Scott on Trusts* § 185 specifically recognizes that trustees should not act in such a way as to defeat or impair substantially the accomplishment of the purposes of the trust. The Juvenile Shoe Plan document identifies as its primary purpose the policy of investing in Company stock. Therefore, Commerce Bank's actions in following directions from the Administrative Committee did not defeat or impair the purpose of the ESOP.

Moreover, the duty of reasonable investigation reference in § 185 of *Scott on Trusts* should not be applied in this case because:

(1) ERISA § 403(a)(1) does not, by its terms, impose a duty to investigate;

(2) such a decision would be consistent with ERISA's legislative history and the Tenth Circuit's conclusion in *Ershick*; and

(3) such a conclusion is consistent with other common law authorities and sound public policy.

ERISA § 403(a)(1), *Ershick*, and sound public policy have been discussed above. Additionally, the rule of law advocated by Commerce Bank and affirmed by the Eighth Circuit is consistent with other common law authorities.

The *Restatement (Second) of Trusts* § 185 (1959) reflects the common law with respect to the duty of a trustee to follow the direction of a person with a power to control – "the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power." This rule of law does not impose a duty to investigate, but merely a duty not to ignore breaches of duty of which the trustee has notice.

The fact that Commerce Bank had such responsibilities does not make the Bank an ERISA fiduciary with respect to the Juvenile Shoe stock. The Eighth Circuit agreed, concluding that Commerce Bank did not have fiduciary duties with respect to the stock, but that the Bank had satisfied the statutory mandates of 29 U.S.C. § 1103 by acting in accordance with the terms of the ESOP and in compliance with ERISA. A-26. No purpose would be served by granting certiorari in this case, particularly where the two Court of Appeals' decisions which have addressed the responsibilities of directed trustees – *Maniace* and *Ershick* – found that the trustees were not liable.

II. The *Maniace* Decision Is Consistent With Public Policy and Does Not Immunize Directed Trustees From Liability.

Finally, in points (5) and (6) of their petition for writ of certiorari, petitioners contend that the *Maniace* decision thwarts important public policies. In particular, petitioners argue that that decision, coupled with the United States Supreme Court decision in *Mertens v. Hewitt Associates*, provides complete immunity for trustees of ERISA plans. *See* Petition at 17; *Mertens v. Hewitt Associates*, ___ U.S. ___, 124 L.Ed.2d 161, 113 S. Ct. 2063 (1993).

To the contrary, although the Court of Appeals concluded in *Maniace* that Commerce Bank was not a fiduciary within the meaning of ERISA based on the facts in this case, the Bank nevertheless faced – and satisfied – strict statutory mandates pursuant to ERISA § 403(a)(1), 29 U.S.C. § 1103(a)(1). Rather than being "immunized" from liability, Commerce Bank was properly held to the requirements of ERISA § 403(a)(1) that the Bank act at all times in accordance with the terms of the Trust and the Plan *and* in a manner which was not contrary to the requirements of ERISA. *See id.*

Moreover, the United States Supreme Court did not hold in *Mertens v. Hewitt Associates* that nonfiduciaries are not subject to *any* liability under ERISA. Instead, the Supreme Court concluded that nonfiduciaries may not be held liable for *money* damages. 124 L.Ed.2d at 174. Such persons and entities may nevertheless be held liable for equitable relief. *See, e.g., Howe v. Varity Corp.*, 36 F.3d 746, 755 (8th Cir. 1994) (recognizing that *Mertens* does not

preclude an award of traditional equitable relief against nonfiduciaries).

Petitioners' cry that Commerce will be "completely immune from participant suits in state or federal court, regardless of what they have done," thus rings hollow. Commerce Bank was subject to the requirements of 29 U.S.C. § 1103 at all times with respect to the Juvenile Shoe stock, and the Eighth Circuit properly concluded that Commerce Bank had met its obligations with respect to the stock. Certiorari is thus unwarranted in this case based on statutory requirements, judicial decisions, or public policy concerns.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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